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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 538

G. L. CHRISTIAN AND ASSOCIATES, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition For a Writ of Certiorari to the United States Court of Claims

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT

Counsel for petitioner in the above entitled case received the brief for the United States in opposition to the petition for a writ of certiorari on November 12, 1963. That brief, touching as it does only the surface of the problem, fails to reach the depth of the issue or to consider the magnitude of the problem which is presented to the Supreme Court for resolution. Ac-

cordingly, petitioner respectfully submits this reply, hoping both to set forth the real scope of the problem and also to note recent relevant developments which have come to petitioner's attention since the filing of its petition.

THE ISSUE PRESENTED FOR REVIEW

The Government's statement to the contrary, the basic issue here presented is one of precedence. Does a contract form which is drafted pursuant to specific statutory authority by the Federal Housing Commissioner and the Assistant Secretary of Defense for Properties and Installations become, upon adoption and signing by the parties, a solemn contractual document which is the sole source of their mutual rights and obligations? Or, on the other hand, does the contract contain as a matter of law a clause required by a regulation, which was promulgated by the Secretary of Defense for internal departmental management, even though that clause was deliberately omitted from the contract form? Included in this problem are the subsidiary questions: whether the Secretary of Defense has the power to enter into a contract which does not contain all the clauses contained in the hundreds of pages of the Armed Services Procurement Regulation (and the various implementing regulations) which he himself promulgated for the internal management of the department; and whether automatic incorporation of a regulation into a contract can be accomplished just by using the phrase "force and effect of law."

In short, the whole area of Government contracts is at a crossroads. Do we have procurement by contract or procurement by regulation? The former has been

the preference of this country since its early beginnings; the latter will be the result if the decision of the Court of Claims is not reversed. Recognition of the possibility of this latter result is shown by the recent article published in the October 1963 issue of the George Washington University Law Review entitled, "Contract By Regulation" (Appendix, *infra*, p. 1a) and by an article in the Navy General Counsel's Newsletter dated February 1, 1963 entitled, "ASPR Becomes A Clause Handbook" (Appendix, *infra*, p. 2a).

IN REPLY

1. In the first argument the Government has assumed the point in dispute. Never has this Court incorporated a regulatory clause into a contract and the decisions of this Court in *De Laval Steam Turbine Co. v. United States*, 284 U.S. 61, 71-74 (1931) and *College Point Boat Corp. v. United States*, 267 U.S. 12 (1925) do not so hold. Rather, they held that Congress could by statute give a right to cancel a contract and that this right of cancellation became part of the contract. There is no such statute in existence now and what the Government in its answer and the court below have said is that a regulation having the "force and effect of law" carries the same power.

Certainly, there is no statutory basis for reading a termination article into the contract and the Assistant Secretary of Defense did not violate a Congressional mandate when he and the Federal Housing Commissioner omitted the termination article. Congress has *refused* to enact a peacetime replacement for the Contract Settlement Act of 1944 and the Act of June 15, 1917 (relied on in the *De Laval* and *College Point Boat* cases) which at one time did permit the action

which is subject to attack here. Finally, even the regulation in issue shows that the only course open to the contracting officer when the termination article was omitted was to try to amend the contract to include such a clause. See sec. 8.101 of ASPR on page 98a of Appendix B in the petition.

The Government seeks to support the radical conclusion of the court below by saying that the insertion of clauses permitting termination for the convenience of the Government is a "recognized principle of public procurement policy" and that "'procurement policies set by higher authority [should] not be avoided or evaded (deliberately or negligently) by lesser officials . . .'" However, this position is erroneous in both respects. For over a century, this Court has followed the rule of allowing anticipatory profits as part of the damages the Government must pay for unjustified termination of a contract unless limited by contract provision or statutes; and those claims under this contract which were completely settled were done so on the basis of allowing anticipatory profits. Furthermore, the official legal and procurement handbooks of the Government agencies specifically acknowledge this liability and excerpts from these publications are found on pages 104a-105a of Appendix C in the petition.

With regard to the second point concerning the avoiding of policies set by higher authority, can the Government honestly suggest that the Assistant Secretary of Defense for Properties and Installations and the Federal Housing Commissioner are "lesser officials" incapable of approving a contract which does not follow exactly the form set forth in regulations promulgated for internal departmental management and the guidance of contracting officers?

This Court has held that one who seeks to avail himself of a regulatory remedy must comply with the conditions set forth in those regulations and found in the Federal Register. See *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947). Here, however, petitioner is not seeking regulatory relief. It is seeking accepted common law damages for breach of a contract drawn up by authorized Government officials.

2. In the second part of its argument, the Government is seeking to support its position on the issue of incorporation by law by saying the termination article was actually incorporated by reference. At two specific points in the contract, as well as in supporting documents dealing with the mortgage loan, there are indeed references to a termination by the Government and these were for the benefit of the private lenders who financed the Capehart project. In a project such as this, the Government agrees to take over the loan when the project is completed. Because, however, the private lenders knew that the contract might be terminated by the Government even though there was no termination article (see *United States* v. *Mississippi Valley Co.*, 364 U.S. 520, 532 (1961) (Dixon-Yates contract)) or that the contract might later be amended to include a termination article (see sec. 8.101 of ASPR, 32 C.F.R., 1954 rev.), they insisted upon references to the Government's termination for convenience in these documents. The Government guarantee was not effective until the housing construction was complete, therefore, the private lenders insisted upon a provision that would make the Government guarantee effective, to the extent of the funds they advanced, if the Government should ever elect to terminate the housing contract for its convenience. (Plaintiff's Ex-

hibit No. 6, Brief in Support of Plaintiff's Motion for Rehearing and Reargument.)

Thus, though the *right to terminate* was deliberately omitted from the contract, there are references to such a termination in the contract documents to take care of the situation where the Government exercised its *power* to terminate or breach. The Government cannot say that this means the right to terminate was included in the contract.

3. The matters dealt with in the third part of respondent's arguments are well covered in the fourth reason for granting the writ found on pages 16-21 of the petition. Section VIII of ASPR was not then and is not now issued pursuant to 10 U.S.C. secs. 3012, 6011 and 8012 (1958); Section VIII was promulgated long before these statutes were enacted. Rather, Section VIII was issued under the authority of the office housekeeping statute (5 U.S.C. sec. 22 (1958)) and interprets the Armed Services Procurement Act of 1947—a statute of limited purpose which cannot be said to contain broad terms dealing with procurement generally. Congress has refused to enact a bill dealing with termination of Government contracts even though there was such a law in effect at the end of World War II. The result is that Section VIII of ASPR has no statutory foundation and the official procurement law publications of the Army, Navy and Air Force have for years expressly so stated. All three state unequivocally that a termination article is without statutory foundation and must be included in the contract to be operative. See pages 101a-103a of Appendix C in the petition.

4. The Government here says that the issue of whether the Armed Services Procurement Regulation

applies to Capehart Act projects is no longer important. The decision below squarely presents the question of whether a statute dealing with a specific subject that affects two instrumentalities of the Government, namely, the Department of Defense and the Federal Housing Administration is restricted in application by such a limited purpose statute as the Armed Services Procurement Act of 1947 which clearly only applies to one of such two instrumentalities. The issue as to the breadth of application of the Armed Services Procurement Act of 1947 is still most important to this country's vital multi-billion dollar military procurement program.

5. The subcontracts do not limit the rights of the subcontractors, as contended by the Government, with regard to recovery for unauthorized termination by the prime contractor. If ASPR applies as a matter of law to the subcontracts, which is denied by the petitioner, a convenience termination article is still not a part of the subcontracts. Unlike the wording of ASPR 8-703, ASPR 8-706, setting forth a convenience termination article which may be used in a subcontract, is not a mandatory provision and does not require the use of that article. Therefore, by no stretch of the imagination can the convenience termination article be said to be a part of the subcontracts as a matter of law. The decision below completely changes the previously-accepted position of subcontractors in Government contracting. The rights of subcontractors, being most important to the defense program and the economy of the country, can only be clarified by a determination of the Supreme Court.

CONCLUSION

For the foregoing reasons, the arguments of respondent should be rejected and the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

The following is the first page of a seven page commentary found in Cibinic, *Contract by Regulation*, 32 GEO. WASH. L. REV. 111 (1963):

CONTRACT BY REGULATION

*John Cibinic, Jr.**

Although the courts often have stated that the United States is bound by commercial rules of law when it enters into a contract,[1] it is well recognized that many special advantages are given the government at the expense of the party with whom it deals.[2] These advantages often result in a government contractor getting less profit than he thought he had bargained for.

In a recent decision,[3] the Court of Claims added another of these special advantages when it held that a contract clause required to be included in a government contract by the Armed Services Procurement Regulation (hereinafter referred to as ASPR) would be read into the contract even though it was not reproduced or incorporated by reference therein.

Christian[3a] involved a construction contract which was terminated for the convenience of the government when the project was cancelled. The contractor, basing his claim on a line of government contract cases[4] as well as on commer-

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[1] Lynch v. United States, 292 U.S. 571 (1934); United States v. Purcell Envelope Co., 249 U.S. 313 (1919); The Floyd Acceptances, 74 U.S. (7 Wall.) 666 (1869).

[2] See United States Navy Department (Office of General Counsel), Preface to Navy Contract Law (2d ed. 1959).

[3] G. L. Christian & Associates v. United States, 312 F. 2d 418 (Ct. Cl. 1963), motion for rehearing and reargument denied, Ct. Cl. No. 56-59, July 12, 1963.

[4] United States v. Purcell Envelope Co., supra note 1; United States v. Behan, 110 U.S. 338 (1884).

cial law principles, attempted to collect anticipated profits which would have been earned had the contract been completed. The claim was denied on the basis that anticipated profits were payable only where there was a breach. Since the government had reserved the right to terminate, there was no breach. The fact that the right to terminate was not included in the contract did not deter the court. It held that a clause containing such a right was required by a regulation which had the force of law and, therefore, would be read into the contract by the court.

A further examination of this holding appears worthwhile, in view of the history of its development and the size and nature of Department of Defense procurement regulations. This article will deal primarily with the ASPR, which is the principal regulation governing defense procurement.

The opening paragraphs of an article found in the *OGC Newsletter*, Office of the General Counsel, Department of the Navy, Vol. 9, No. 1, Feb. 1963, pp. 17-19 is reproduced below.

ASPR BECOMES A CLAUSE HANDBOOK?

G. L. Christian and Associates v. *U. S.*, Ct. Cl. , No. 56-59, Jan. 11, 1963

For years Government procurement lawyers have discussed having a clause book of "boiler-plate", portions of which would be incorporated by reference in contracts.

Now the Court of Claims has rendered a decision which may go far toward achieving this end. If a contract governed by ASPR fails to include a mandatory clause, the court will determine the rights of the parties as if the clause had been included.

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[5] Restatement, Contracts § 329 (1932).